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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

Term, 1973

No. 72-1056

WILLIAM FIORE, individually and d/b/a Fiore Trucking Company and William Fiore Contracting Company,
Petitioner,

vs.

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In The

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No. .....

WILLIAM FIORE, individually and d/b/a Fiore Trucking Company and William Fiore Contracting Company,

Petitioner,

vs.

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on December 12, 1972.

Citations to Opinion Below.

The Opinion of the United States Court of Appeals for the Third Circuit, filed December 12, 1972, is printed in Appendix "A" hereto. The judgment of the United States Court of Appeals for the Third Circuit entered December 12, 1972 is printed in Appendix "B" hereto. The Order of the United States Court of Appeals for the Third Circuit denying the petition for rehearing entered January 3, 1973 is printed in Appendix "C" hereto.

Jurisdiction.

The judgment of the Court of Appeals below, Appendix "B", was entered on December 12, 1972. Rehearing was sought and the petition for rehearing was denied on January 3, 1973 and judgment entered January 3, 1973. Jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Questions Presented for Review.

1. May the government circumvent the provisions of a criminal statute, 29 U. S. C. §216 (a), which specifically limits the imposition of a jail sentence to a second conviction under that section for willful violation of the Fair Labor Standards Act, by proceeding in criminal contempt of a civil injunction?

2. Where the trial court imposed a fine of $10,000.00 and a jail sentence of 60 days, does the action of the Court of Appeals in eliminating the $10,000.00 fine convert the procedure in the court below to a petty offense so as to deprive the petitioner of his right to trial by jury?

Constitutional Provisions, Statutes and Rules Involved.

The constitutional provisions involved are the Sixth Amendment to the Constitution of the United States, the right to jury trial; Fair Labor Standards Act, 29 U. S. C. §216 (a), which permits criminal sanctions only upon a second offense; 18 U. S. C. §401, the power of courts to punish for contempt.

Statement of Facts.

The petitioner, William Fiore, individually and doing business as Fiore Trucking and William Fiore Contracting Company, on November 16, 1959 was enjoined from violating various provisions of the Fair Labor Standards Act. This action was instituted as a civil action by the government.

On April 19, 1962, in the same civil action, another order was consented to requiring petitioner to pay $1,859.50 in back wages to fifteen employees and broadening the terms of the 1959 order to include the enjoining of petitioner from violating the minimum wage provisions of the Fair Labor Standards Act.

On April 29, 1965, petitioner was brought before the same court, in the same civil action, and on a criminal action filed to No. 65-37. In this action the same Judge found that petitioner had willfully and flagrantly violated the judgment entered on November 16, 1959 and the Order entered April 19, 1962, and having been advised that petitioner had made restitution of back wages in the sum of $15,000.00, the court levied a punitive fine of $1,000.00 and a compensatory fine of $1,000.00 plus the costs of the action.

On November 5, 1971, on petition reciting the above facts to the court below, which petition was filed by the United States of America and attorneys for the Department of Labor, a rule to show cause was entered against petitioner to show why he should not be held in criminal and civil contemp of Court. The caption of the proceedings was civil and not criminal.

The Order entered November 5, 1971, *inter alia,* as follows:

> "It now appears to the Court that good cause has been shown that the defendant, William Fiore, individually and doing business as Fiore Trucking and Contracting, Diamond Excavating & Hauling, Inc., a corporation, and Willaim Fiore, individually and as President and General Manager of said corporation, should be prosecuted for civil and criminal contempt of this Court."

The court then provided that the defendant should show cause

> "Why he should not be found guilty of civil and criminal contempt of this Court by reason of his failure and refusal to obey, and disobedience of, the judgment and orders of the Court as aforesaid, and punished for said civil and criminal contempt."

A criminal number 71-208 appears on the petition of the government and the Order of Court. However, no information or indictment appears of record.

A non-jury trial was held on the rule to show cause, before the same Judge who entered the rule on both civil and criminal contempt charges. On February 1, 1972, the court found petitioner guilty of criminal contempt and civil contempt and entered a civil judgment against petitioner in the sum of $31,364.57; civil judgment in the sum of $12,000.00 consisting of $10,000.00 as a remedial fine and $2,000.00 covering investigative costs and costs of the civil and criminal contempt proceedings. These judgments were entered at Civil Action No. 17712, the original civil action which had been commenced on November 16, 1959. In addition, petitioner was sentenced to the custody of the Attorney General for imprisonment for a period of sixty (60) days, to commence at noon on February 15, 1972, provided if the payment of the civil judgment and costs was made within thirty days of February 15, 1972, the prison sentence would terminate at the expiration of thirty (30) days.

An appeal was taken to the Court of Appeals for the Third Circuit, which resulted in the Court of Appeals finding that a fine and imprisonment were improper under 18 U. S. C. §401. Since the government agreed that the fine and imprisonment were improper but contended that only the fine be eliminated, the Court of Appeals, to remedy the illegality of the sentence and procedures in the court below, modified the sentence and judgment by lifting the $10,000.00 fine in the civil action and reducing the same to $2,000.00. The time within which payment should be made in order to reduce the

sentence from sixty to thirty days was extended by requiring that it be paid within fifteen days after the mandate or certified judgment is received from the Clerk of the United States Court of Appeals for the Third Circuit.

It is from the action of the Court of Appeals for the Third Circuit that this petition for certiorari is taken.

Reasons for Granting the Writ

The reasons for granting the writ are succinctly set forth by the dissenting opinion of the Honorable Ruggero J. Aldisert in the Court of Appeals for the Third Circuit.

The petition filed in the District Court, upon which the rule to show cause was entered, was captioned "Petition for Prosecution of William Fiore, individually . . . for civil and criminal contempt of court". It was brought as an *"In Re"* petition and not the United States of America vs. the defendant. The original caption of the civil action was in the name of James P. Mitchell, Secretary of Labor, United States Department of Labor vs. William Fiore, *et al.* All of the proceedings in the case arose under the Fair Labor Standards Act, 29 U. S. C. § 201, *et seq.* 29 U. S. C. § 216 (a) is the section which makes violations of said Act a crime and provides for criminal penalties for violations of the same. Said section provides as follows:

> "(a). Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection."

The proceedings evidently followed by the court below since 1959 is under 29 U. S. C. § 217 establishing the jurisdiction of District Courts to restrain violations of the Act, which section provides as follows:

"The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215 (a) (2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title."

Section 217 creates and gives jurisdiction to the Federal District Courts to restrain violations of Section 215 of the Act and invokes the equity powers of the court. It is designed to be remedial and operate in the future. See *Wirtz v. Ocala Gas Co.*, 336 F. 2d 236 (C. A. Fla. 1964); *Goldberg v. Kickapoo Prairie Broadcasting Co.*, 288 F. 2d 778 (C. A. Mo. 1961); *Wirtz v. Old Dominion Corp.*, 286 F. Supp. 378 (D. C. Va. 1968), all of which hold that the injunctive procedures under Section 217 are to insure future compliance and not invoked as punishment. In *Hodgson v. American Can Co.*, 328 F. Supp. 261 (D. C. Pa. 1971), it was held that the proceedings for injunctive relief under Section 217 is a civil action entirely lacking in the formal procedures necessary for criminal action. In the *Hodgson case* Judge Lord, in the District Court for the Eastern District of Pennsylvania, in fact denied a jury trial on the equity proceedings for injunction on the ground that the injunctive relief was a civil action and actions under Section 217 were "remedial, not punitive, meant to prevent future violations, not punish past ones".

Criminal procedures in the Federal District Courts are governed and controlled by the Federal Rules of Criminal

Procedure. A criminal action can only be instituted in the District Court by use of an indictment or information, Rule 7, Federal Rules of Criminal Procedure. Although the Federal Rules of Criminal Procedure provide for the filing of a complaint, it is stated in 8 Moore's Federal Practice, paragraph 3.02:

> "Although it is sometimes said that the complaint institutes a criminal proceeding in the federal courts, this statement must be qualified. A complaint does not function as a pleading, and a defendant may not be subjected to trial based thereon, but only upon an indictment or information. The filing of a complaint is not even a prerequisite to the filing of an indictment or information."

There has never been an indictment or information filed against petitioner so that he has not been convicted under Section 216 (a), 29 U. S. C.

Coercive imprisonment in this case does not depend upon the ability of the condemnor to comply with the Court's order since, in any event, he would be required to serve a thirty-day jail sentence. There can be no doubt that the action of the court below was to punish for criminal contempt. *Shillitani v. United States,* 86 S. Ct. 1531, 384 U. S. 367 (1966). As stated above, criminal procedures in federal courts can only be instituted by use of an indictment or information, neither of which was filed against petitioner in the court below.

The procedures followed in the court below, which are unauthorized by Congress and precluded by the Constitution of the United States, gives the government the power to elect to proceed under Section 217 of the Fair Labor Standards Act and then secure criminal sanctions under the guise of a civil action. This procedure totally evades the statutory provsisions of Section 216 (a) and also precludes an in-

dividual from ever having the merits of his case presented to a jury.

The criminal action under the Fair Labor Standards Act is brought by the Department of Justice. See *Labor Relations Expediter,* page 220. In the instant case the petition was signed not only by the United States Attorney for the Western District of Pennsylvania but also by three attorneys with the United States Department of Labor, as well as an affidavit by one of the Department of Labor attorneys, all of which could only be done in a civil type proceeding.

As stated by Judge Aldisert in his dissenting opinion:

> "My quarrel with the government's position, the district court's acceptance of the government's request that Fiore be imprisoned, and the majority's affirmance of this jail sentence, is that I read the Fair Labor Standards Act as providing that a willful violator of the Act's provisions may not be sentenced to jail unless he has been previously convicted in a criminal proceeding under §216 (a). Since the government never elected to proceed by criminal indictment, but relied only on the civil and criminal contempt procedure, 18 U. S. C. §401, the imposition of a jail sentence was contrary to law."

Judge Aldisert then proceeded to resolve the dilemma between §216 (a), 29 U. S. C., and 18 U. S. C. §401, when he reasoned as follows:

> "The resolution to this apparent statutory dilemma lay not in holding that §216 (a) strips the district court of the power to vindicate willful violations of its decrees. Nor is it suggested, as by the mjority and *Fidanian,* [1] that Congress contemplated imprisonment for conduct constituting a violation of an injunction, on the one hand, whereas, on the other, it expressly prohibited im-

1. *United States v. Fidanian,* 465 F. 2d 755 (5th Cir. 1972)

prisonment for the identical conduct when examined in the context of an initial F. L. S. A. violation. Rather, a federal court's contempt power, §401, can be reconciled with the language of §216 (a) simply by regarding the latter provision not as a limitation on the court's power to vindicate its authority, but merely as a restriction on the type of punishment to be meted out upon a finding of such contempt. That is, the district court could have imposed a fine on Fiore for violating its injunction. Thus, both the Fifth Circuit and the majority, in zealous haste to protect the contempt power, brush with too broad a stroke, and hence fail to effect the ready reconciliation Congress intended."

If the procedure followed by the government in Fair Labor Standards Act cases is approved, then the government has no reason ever to proceed under 18 U. S. C. §216 (a) and secure a first conviction before attempting to jail a violator of the Fair Labor Standards Act for alleged subsequent offenses. It, in effect, would permit government bureaucratic procedures to eliminate a criminate statute from the statute books and render the particular section of the statute mere surplusage.

The action of the Court of Appeals in eliminating a $10,000.00 fine and thus converting the offense to a petty offense, which denies petitioner a right to jury trial, leaves petitioner in jail without basic criminal procedural safeguards being accorded to him. One is reminded of the language of the Honorable J. Skelly Wright in *Smith v. United States,* 331 F. 2d 784 (C. A. D. C.), at page 793, when he held:

"The Government argues that, considering calendar congestion and related evils, six months really is not an unreasonable time to spend in jail awaiting trial. That appraisal, of course, depends on whose time is being spent."

Since it is petitoner's time which will be spent in jail unless the procedure followed by the government is changed and since the offense is subject to a $10,000.00 fine even though remitted by the Court of Appeals, the action of the Court of Appeals should be reversed and proper procedures outlined for the government in keeping with statutory procedures as well as constitutional guarantees.

Respectfully submitted,

JEROME M. LIBENSON,
HAROLD GONDELMAN,
Attorneys for Petitioner.

Appendix "A".

Opinion of the Court.

(Filed December 12, 1972)

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 72-1232

JAMES P. MITCHELL, Secy. Labor,
United States Dept. of Labor,

v.

WILLIAM FIORE, Ind. and d/b/a Fiore
Trucking Company and William Fiore
Contracting Company,

Appellant.

(D. C. Civil Action No. 17712)

No. 72-1233

THE UNITED STATES,

v.

IN RE: WILLIAM FIORE, Individually and doing business as Fiore Trucking and William Fiore Contracting Company,

Appellant.

(D. C. Criminal No. 71-208)

Appeal from the United States District Court for the Western District of Pennsylvania

Argued September 8, 1972

Before Van Dusen, Aldisert and Hunter, *Circuit Judges*

Van Dusen, *Circuit Judge.*

Defendant appeals from the sentence and judgment filed February 2, 1972, in which he was ordered to pay various dollar amounts as fines and costs and to be imprisoned for 60 days, or for 30 days if he paid the "civil judgments and costs" within 30 days. The sentence and judgment are based on the district court's findings of fact and conclusions of law reported in 337 F. Supp. 972 (W. D. Pa. 1972). The district court decided that defendant was in civil and

criminal contempt of an injunction previously issued against him pursuant to section 17 of the Fair Labor Standards Act of 1938, 29 U. S. C. §217 (1970). We have concluded that the district court's holding that defendant violated the injunction must be affirmed and that civil and criminal sanctions are appropriate, but, for the reason given below, we modify the financial penalties imposed by the district court.

Defendant is in the trucking business and his customers include United States Steel and Jones & Laughlin Steel Co. On November 11, 1959, he consented to an injunction that he be restrained from violating sections 15(a)(2) and 15(a)(5) of the F. L. S. A. by failing to pay overtime compensation as required by section 7 and by failing to keep records in accordance with section 11(c) of the F. L. S. A. and 29 C. F. R. 516. On April 19, 1962, defendant consented to the entry of a decree finding him guilty of civil contempt of the 1959 injunction, requiring restitution of wages wrongfully withheld, requiring payment of the Government's costs of investigation, and broadening the 1959 injunction to require compliance with the minimum wage provisions of section 6 of the F. L. S. A. (29 U. S. C. §206). Again, on April 25, 1965, defendant was found to have violated the 1959 injunction as amended. Held in criminal and civil contempt, he was ordered to pay a punitive fine of $1,000., a compensatory fine of $1,000. covering the costs of investigation, and court costs, all in addition to the restitution of back wages of $15,000. which he made at that time.

The present appeal involves yet another violation of the above-mentioned injunction. On November 3, 1971, the Government petitioned the district court again to find defendant in civil and criminal contempt, alleging that he had violated the minimum wage, overtime, and record-keeping provisions of the injunction. The district court

issued an order on November 5 that defendant show cause why he should not be found guilty of criminal and civil contempt. A trial to the court on these charges was held on January 27, 28, and 31, 1972. At the beginning of the trial, the Government made clear that it was proceeding under 18 U. S. C. §401(3) (1970) in submitting proofs on the issue of criminal contempt.[1]

Defendant's employees would put the time they worked each day on slips or time cards and submit these to defendant. There was uncontradicted evidence that defendant, upon being approached by Labor Department compliance officer McFeele, had retained these slips for only the previous three months, not for the requisite two years, see 29 C. F. R. 516.6(a)(1) (1972). The Government also introduced the testimony of nine former employees of defendant that he made a practice of wrongfully reducing the amount of time the drivers had indicated on the time slips and of failing to compensate drivers for time spent in preparing trucks for use and in driving trucks to and from their assigned work locations. This reduction of time would have made defendant's payroll records inadequate under 29 C. F. R. §516.2(a)(7) (1972); and the failure to pay drivers for this type of preparation and transportation time would have violated the minimum wage and overtime provisions of the F. L. S. A. McFeele testified that, based on interviews with 20 to 30 employees, he estimated the average time not compensated for was 1 1/2 hours per man per shift; applying this estimate to the number of employees and amount of time shown on the payroll records defendant did keep, McFeele arrived at the figure of $31,364.57 for the back wages due the 79 employees. Defendant denied all the Government's con-

1. See affidavit of Jay C. Waldman filed September 28, 1972, to which defendant has filed no counter-affidavit.

tentions except that he conceded he had only retained the time slips for the past three months. The district court concluded that the Government had established its contentions "by clear and convincing evidence and beyond a reasonable doubt" (337 F. Supp. at 974).

The district court entered judgments against defendant in the amounts of $31,364.57 for the benefit of the employees, $2,000. to cover the Government's costs of investigation, and $10,000. as "a remedial fine . . . as punishment for the civil contempt . . . ." The court also ordered defendant to pay court costs. Finally, the court sentenced the defendant to imprisonment as mentioned above.[2]

Defendant contends that the district court erred in its findings. On both the civil and criminal sides, our review of the record shows that the district court holding, that the Gov-

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2. The precise sentence and judgment is as follows:

" . . . the Clerk will enter a civil judgment against the defendant, William Fiore, individually, and doing business as Fiore Trucking and William Fiore Contracting Company in the sum of $31,364.57 for the benefit of the employees named in the summary of unpaid wages attached to the Findings and Conclusions which are incorporated herein.

"2. A civil judgment is entered against the said defendant, William Fiore, in the sum of $12,000.00, which in the aggregate embraces $2,000.00 covering the investigative costs and preparation of the trial in this case, and a remedial fine in the sum of $10,000.00 as punishment for the civil contempt of this Court.

"3. The said defendant, William Fiore, shall pay the costs of the civil and criminal proceedings.

IMPRISONMENT

"The said Willaim Fiore having been found guilty of criminal contempt of this Court by evidence beyond a reasonable doubt, and in accordance with the oral sentence pronounced from the Bench at the conclusion of the trial:

"1. The said William Fiore is herewith sentenced to the custody of the Attorney General of the United States for imprisonment for a period of sixty (60) days to commence at Noon on February 15, 1972.

"2. On payment of the civil judgments hereinbefore mentioned and costs within 30 days of February 15, 1972, the prison sentence will terminate at the expiration of the said 30 days."

ernment proved its case by, respectively, clear and convincing evidence and beyond a reasonable doubt, was fully supported.[3] For the scope of our review, see *United States v. Delerme*, 457 F.2d 156, 160 (3d Cir. 1972).

Defendant focuses his objections upon the procedure followed by the district court. A criminal contempt proceeding need not, as he suggests, be initiated by indictment.[4] The order to show cause[5] furnished him adequate notice under F. R. Crim. P. 42(b) and thus met the requirements of due process.[6] We have concluded that the proper procedures were observed in regard to the criminal contempt, and it was permissible for the district court to try the criminal and civil contempts together.[7] Since no disrespect to, or criticism of, the trial judge was involved, *see* F. R. Crim. P. 42(b), it was proper that he try such contempt charges despite his having presided over defendant's three earlier trials.[8]

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3. Defendant raises several questions as to the accuracy of McFeele's figures. The Government having shown that employees performed work for which they were not compensated and produced evidence from which the extent of such work, as computed by the district court, could be reasonably inferred, the burden was on defendant to establish the precise amount of work *Anderson v. Mount Clemens Pottery Co.*, 328 U. S. 680, 687-88 (1946). The district court here had adequate grounds for rejecting defendant's evidence on this point. Moreover, here, as in *Mount Clemens*, "[t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of §11(c) of the Act." *Id.* at 688.

4. *Green v. United States*, 356 U. S. 165, 183-85 (1958); *United States v. Bukowski*, 435 F. 2d 1094, 1099-1102 (7th Cir. 1970); Wilson, *Criminal Contempt in the Federal Courts*, 55 F. R. D. 102, 109 (1970).

5. Defendant argues that the order to show cause shifted to him the burden of proving his own innocence. We reject this argument, as did the court in *In re Van Meter*, 413 F. 2d 536, 538 (8th Cir. 1969). The record makes abundantly clear that the Government had the burden of proving the criminal contempt beyond a reasonable doubt.

(Footnotes continued on following page)

The defendant also argues that he was denied his right to a jury trial.[9] There is, of course, no such right in the trial of a civil contempt charge. In *Cheff v. Schnackenber,* 384 U. S. 373, 379-80 (1966), the Supreme Court held that a person sentenced to six months' imprisonment for criminal contempt had no right to a jury trial because his offense was "petty." 18 U. S. C. §1(3)(1970), which the Court referred to in *Cheff,* defines as petty any offense whose penalty does not exceed six months' imprisonment or a $500. fine or both. In the present case, the $10,000. fine, although labeled by the district court as "remedial," was neither coercive nor compensatory; rather, it was clearly punitive. Were we to let it stand, defendant's contempt would not be petty and he might have been wrongly deprived of a jury trial. However, for the reason discussed below, we will vacate the $10,000. punitive fine. It could be maintained that, notwithstanding our action, defendant's offense, having been punished initially with a $10,000. fine, is forever branded as being not

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(Footnotes continued from preceding page)

6. *United States v. United Mine Workers of America,* 330 U. S. 258, 295-98 (1947); *Backo v. Local 281, Carpenters,* 438 F. 2d 176, 181-82 (2d Cir. 1970); *United States v. Bukowski,* 435 F. 2d 1094, 1102-03 (7th Cir. 1970).

Counsel for defendant, who did not handle the case before the district court, now maintains that the failure of the transcript to include the opening remarks of the Assistant United States Attorney prejudiced the defendant in preparing the appeal. In an affidavit submitted to this court, the Assistant United States Attorney states that in these remarks he made clear that the Government relied on 18 U. S. C. §401(3)(1070), which authorizes the federal courts to punish violations of their orders. We fail to see how defendant has been prejudiced by any possibly technical non-compliance with F. R. A. P. 10(e). The transcript contained numerous references to "criminal contempt;" and appellate defense counsel recognized the relevance of §401(3), for his brief includes a discussion of it.

7. *United States v. United Mine Workers of America,* 330 U. S. 258, 298-301 (1947).

8. *Nilva v. United States,* 352 U. S. 385, 395-96 (1957); *United States v. Conole,* 365 F. 2d 306, 308 (3d Cir. 1966).

9. Defendant never requested a jury trial. For present purposes, however, we will assume that he did not waive any rights in this respect.

petty and thus warranting a jury trial. Two factors persuade us to the contrary. First, the district court viewed the criminal contempt as petty; this is indicated by the court's mistakenly denominating the fine as "civil" and "remedial." *See Phillips v. United States,* 457 F. 2d 1313 (8th Cir. 1972). Second, in applying the proposition in *Frank v. United States,* 395 U. S. 147, 149 (1969), that the severity of the penalty actually (as opposed to potentially) imposed best measures the seriousness of the offense, we think that the sentence ultimately imposed is the sentence that is relevant. We note that we would not be the first Court of Appeals that has reduced a contempt sentence so as to comply with *Cheff,* rather than remand for jury trial. *See Mirra v. United States,* 402 F.2d 888 (2d Cir. 1968).

Finally, in addition to challenging the correctness of the district court findings and the procedures, defendant contends that the district court's judgment and sentence were defective. He does not challenge the civil contempt fines concerning back wages, investigation costs, and court costs, except to suggest that they cannot be handed down in combination with sanctions for criminal contempt. The suggestion is incorrect. *See Penfield Co. v. SEC,* 330 U. S. 585, 593-94 (1947).

Defendant directs at the sentence for criminal contempt three attacks. First, he calls our attention to section 216(a) of the F. L. S. A., which provides for imprisonment of up to six months for all violations of the Act except the first such violation. Had the Government proceeded against him under section 216(a), he would not be liable to imprisonment, never having been convicted a prior time under that section. According to defendant, to permit his imprisonment under 18 U. S. C. §401(3) (1970) for violating the injunction [10]

10. We again point out that defendant had notice that the Government was proceeding under section 401(3). See page 3 above.

would subvert the scheme of section 216(a) and rob him of constitutional rights.[11] This line of argument has been accepted by some courts,[12] but it was squarely rejected in the recent case of *United States v. Fidanian*, 465 F.2d 755 (5th Cir. 1972).[13] There the court reasoned, first, that such a limitation on the power of the federal courts to punish violations of their own orders—which orders, we note, were expressly authorized in section 217—should be explicit. Second, punishment for criminal contempt does not reach the first offenders whom Congress intended to shield in section 216(a); rather, it affects only those who have already experienced a judicial proceeding under the Act, namely, the proceeding when the injunction was issued. As noted above, Fiore has been the defendant in three separate proceedings brought in 1959, 1962 and 1965 to compel him, *inter alia*, to comply with the provisions of the Act and has been held in contempt in two of these proceedings.

Defendant next asserts that the provision in the sentence whereby it would be reduced if he paid the fines within 30 days violates the doctrine set forth by the Supreme Court in *Tate v. Short*, 401 U. S. 395 (1971), and *Williams v. Illinois*, 399 U. S. 235 (1970). There the Supreme Court held that an

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11. For example, section 216(a) also provides for a fine of up to $10,000., and a violation of it would thus not fall within the category of petty offense as defined in 18 U. S. C. §1(3) (1970).

12. *United States v. B & W Sportswear*, 53 F. Supp. 785 (E. D. N. Y. 1943); *United States v. P & W Coat Co.*, 52 F. Supp. 792 (E. D. N. Y. 1943). *But see United States v. Harwoods*, 46 C. C. H. Lab. Cas. ¶31,343 (E. D. Mich. 1962).

13. Unfortunately the legislative history sheds no light on this issue. A provision authorizing injunctions first appeared in the House amendment to the bill already passed in the Senate, S. 2475, *see* H. R. Rep. No. 2182, 75th Cong., 3d Sess. (1938); and the relief for first offenders was added in the House-Senate conference committee, *see* H. R. Rep No. 2738, 75th Cong., 3d Sess. (1938). However, neither of these two reports contains any discussion of the relation between sections 216(a) and 217.

indigent unable to pay a fine cannot be imprisoned for failure to do so. However, defendant did not maintain in the district court, and does not maintain here, that he is unable to pay. Instead he argues that if a poor man in his situation could not be imprisoned, then he too should not be imprisoned. We note that the Supreme Court in both the above cases was careful to disavow any implication that one capable of paying could not be imprisoned for wilful refusal to pay a fine. 401 U. S. at 400-01; 399 U. S. at 242 n. 19. *See United States ex rel. Griffin v. Martin,* 409 F.2d 1300, 1302 (2d Cir. 1969). Moreover, the situation here can be distinguished from the situations in *Williams v. Illinois* and *Tate v. Short.* The fine here is unconditional, and the prison sentence depends not on whether defendant eventually pays but on whether he pays within 30 days. Furthermore, criminal contempt differs from the statutory offenses in those cases because the punishment for contempt in this case was appropriately tailored to the offender. Therefore, the equal protection rationale relied on by the Supreme Court does not apply here.

Lastly, defendant contends that because the $10,000. "remedial fine" is neither coercive nor compensatory, which the Government concedes,[14] it must be punitive. Thus, the district court in effect punished the violation of its order with both a fine and imprisonment, even though §401(3) has been construed to authorize only one or the other. *In re Bradley,* 318 U. S. 50 (1943); *Board of Education v. York,* 429 F. 2d 66 (10th Cir. 1970). On this issue, we agree with defendant. While we could remand to the district court for resentencing, we possess the authority to revise the sentence

14. Appellees' Brief at 4 n. 3.

ourselves. [15] In fact, in *York, supra,* the Court of Appeals corrected the same type of error that appeared here.

Because the Government does not urge that the $10,000. fine be imposed in addition to the imprisonment,[16] and because the record before us clearly indicates the appropriateness of some term of imprisonment,[17] we will modify the district court sentence and judgment as follows:

(a) Paragraph 2 shall read: "2. A civil judgment is entered against the said defendant, William Fiore, in the sum of $2,000.00 covering the investigative costs and preparation of the trial in this case."

(b) In paragraphs 1 and 2 under "IMPRISONMENT," this language shall be substituted for "February 15, 1972:" "the fifteenth day after the mandate or certified judgment in lieu of mandate is received by the Clerk from the United States Court of Appeals for the Third Circuit."

Each party shall bear his own costs in this court.

Aldisert, *Circuit Judge,* Dissenting in Appeal No. 72-1233.

I dissent from the affirmance of the sentence for criminal contempt because I do not believe the government may circumvent the provisions of a criminal statute, 29 U. S. C. § 216

15. *Green v. United States,* 356 U. S. 165, 188 (1958); *Drivers Local No. 639 v. Penello,* 420 F.2d 632, 635 (D. C. Cir. 1969); *United States v. Conole,* 365 F.2d 306 (3d Cir. 1966).

16. Appellees' Brief at 4 n. 3.

17. We note that the Government has agreed, *see* Appendix at 551a-552a, that the defendant should be allowed to serve the sentence on weekends, in order that his trucking business may not be interrupted.

(a),[1] which specifically limit imposition of the sentence of incarceration for wilful violation of the Fair Labor Standards Act, by proceeding in criminal contempt of a civil injunction.

There is no dispute concerning the chronological facts of this case. In 1959, William Fiore consented to an injunction which affirmatively required him to pay overtime compensation and keep records as required by law. He violated the terms of this injunction and, in 1962, consented to a decree of civil contempt. Again, in 1965, he was found to have violated the terms of the injunction, and was held in civil and criminal contempt. The instant proceedings emanate from still a third violation of the terms of the injunction. Thus, it can scarcely be contended that Fiore's conduct did not qualify as "willfully violat[ing] any of the provisions of section 215," and I do not suggest that it did not.

In the government's "detailed findings and conclusions [which were incorporated] in the District Court's Memorandum Opinion at its request," it was the government's position that Fiore "is again in criminal contempt for willfully and flagrantly violating the lawful orders of this Court and [Sections 6, 7 and 11 (c) of the Fair Labor Standards Act, 29 U. S. C.]."

Moreover, in his opening statement at the hearing, Steven K. Ernst, the government prosecutor, stated:

> We will submit, Your Honor, that the Government intends to prove that Mr. Fiore has willfully violated the

1. Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

judgment and the civil contempt—the civil and criminal contempt and we suggest that the only possible remedy in a situation like this is to show Mr. Fiore that this Court and the Government should not be taken so lightly, we suggest a very heavy fine and the possibility of a jail sentence at Your Honor's discretion.

My quarrel with the government's position, the district court's acceptance of the government's request that Fiore be imprisoned, and the majority's affirmance of this jail sentence, is that I read the Fair Labor Standards Act as providing that a wilful violator of the Act's provisions may not be sentenced to jail unless he has been previously convicted in a criminal proceeding under § 216 (a). Since the government never elected to proceed by criminal indictment, but relied only on the civil and criminal contempt procedure, 18 U. S. C. § 401, the imposition of a jail sentence was contrary to law.

I am not persuaded by the contrary conclusion and rationale of the Fifth Circuit in *United States v. Fidanian*, 465 F. 2d 755 (5th Cir. 1972). There, the court held that "a limitation on a federal court's inherent power to punish violations of its own orders must be explicit." 465 F. 2d at 757. Because the court found that "[s]uch an explicit limitation cannot be found in Section 216 (a), nor can one be implied from it," it concluded that merely because an act may constitute both an indictable offense and a contempt does not afford a basis upon which to find a limitation on the contempt power. See *Jurney v. McCracken*, 294 U. S. 125 (1935); *United States ex rel. Brown v. Lederer*, 140 F. 2d 136 (7th Cir.) *cert. denied*, 322 U. S. 734 (1944).

The Fifth Circuit's reliance on *Jurney* is misplaced. Admittedly, Mr. Justice Brandeis therein stated: "Punishment,

purely as such, through contempt proceedings, legislative or judicial, is not precluded because punishment may also be inflicted for the same act as a statutory offense." 294 U. S. at 151. However, this language must not be considered apart from certain important considerations present in that case and emphasized in the opinion, and not present in the case before us.

At issue in *Jurney* was the power of Congress to hold one in contempt for refusal to answer or produce papers in the face of a statute making such refusal a misdemeanor. Enactment of the criminal statute, according to Justice Brandeis, was prompted "because imprisonment limited to the duration of the [Congressional] session was not considered sufficiently drastic a punishment for contumacious witnesses." Thus, the criminal statute, R. S. § 102, *extended* the amount of punishment available. In the case at bar, the statute *limited* the punishment, precluding incarceration for the first "violation of the subsection."

Moreover, present in *Jurney* was the phenomenon of two jurisdictions having power to punish: one, the federal court; the other, the Congress. This occasioned Justice Brandeis to reflect: "As was said in *In re Chapman, supra,* 'the same act may be an offence against one jurisdiction and an offence against another; and indictable statutory offences may be punished as such while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuito* and capable of standing together.'" 294 U. S. at 151-152. This bipartite jurisdictional phenomenon is not present here. Here there is but one tribunal, the district court.

Similarly, *Lederer* has dubious precedental value because of various limitations inhering in the criminal statute there

at issue. For its provisions to become effective, two preliminary exercises of administrative discretion were required. Indeed, the *Lederer* court purposely emphasized the discretionary features of the act: "The existence of the provision in subsection (b) *permitting* the Administration to bring to the attention of the Attorney General, who in his *discretion* may institute appropriate criminal proceedings, does not preclude the right of a court to protect the dignity of its own injunction by punishing wilful and repeated violations of its order." 140 F. 2d at 138. No mandatory two-step discretionary prerequisites are necessary to activate provisions of the criminal statute at bar.

Returning to the facts of this case, an injunction was issued commanding the defendant to obey the provisions of the F. L. S. A. By its terms, the defendant was obliged to do no more than what was required of any law-abiding citizen under similar circumstances. The terms of the injunction imposed no restriction upon him other than those imposed upon the public at large by the provisions of the F. L. S. A. If he wilfully violated the injunction, he thereby wilfully violated the provisions of the statute. Yet, had Fiore been prosecuted under §216 (a), because he was not previously convicted of a violation of the F. L. S. A., he could not been imprisoned. However, because the government proceeded under 18 U. S. C. §401, the general contempt statute providing that the court has the "power to punish by fine or imprisonment, at its discretion," Fiore received a jail sentence. Under these circumstances, may the government proceed by criminal contempt, where there is no limit to the use of incarceration, other than the length of the sentence, and defy the provisions of a criminal statute which explicitly limit incarceration to "an offense committed after the con-

viction of such person for a prior offense under this subsection," 29 U. S. C. §216 (a)?

The resolution to this apparent statutory dilemma lay not in holding that §216 (a) strips the district court of the power to vindicate wilful violations of its decrees. Nor is it suggested, as by the majority and *Fidanian*, that Congress contemplated imprisonment for conduct constituting a violation of an injunction, on the one hand, whereas, on the other, it expressly prohibited imprisonment for the identical conduct when examined in the context of an initial F. L. S. A. violation. Rather, a federal court's contempt power, §401, can be reconciled with the language of §216 (a) simply by regarding the latter provision not as a limitation on the court's power to vindicate its authority, but merely as a restriction on the type of punishment to be meted out upon a finding of such contempt. That is, the district court could have imposed a fine on Fiore for violating its injunction. Thus, both the Fifth Circuit and the majority, in zealous haste to protect the contempt power, brush with too broad a stroke, and hence fail to effect the ready reconciliation Congress intended.

The Fifth Circuit's response to this seemingly obvious restriction on the type of punishment a court may impose under these circumstances once it exercises its unimpaired contempt power is the naked, conclusory statement: "Such an explicit limitation cannot be found in Section 216 (a), nor can one be implied from it." 465 F. 2d 757.

I do not have the slightest difficulty in refusing to accept this statement because, in my view, it is totally devoid of logic and bereft of reasonable statutory interpretation. When Congress provides that one cannot be imprisoned for a wilful violation of the Fair Labor Standards Act unless

one has been previously convicted under a specific subsection, I find it disingenuous to suggest that the language of § 216 (a) is not an explicit statutory exception to the general power to imprison for contempt for committing the same act.[2]

The majority has confused that punishment permitted in contempt proceedings under § 401 with that provided for criminal prosecutions under § 216 (a). Under the latter there may be incarceration only "after the conviction of such person for a prior offense under this subsection." True though it may be that Fiore is a veteran wilful violator of the terms of a civil injunctive decree, until such time as he is prosecuted and convicted under the criminal statute, § 216 (a), he may not go to jail. Congress has so declared in no uncertain terms.

Accordingly, I dissent and would vacate that portion of the sentence in the criminal contempt proceedings ordering incarceration.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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2. This reasoning is similar to that employed in our 1950 case of *Cooper v. Hutchinson*, 184 F. 2d 119 (3d Cir. 1950), where this court found the Civil Rights Act, 42 U. S. C. § 1983, to be an explicit statutory exception to the Anti-Injunction Act, 28 U. S. C. § 2283, an interpretation adopted by the Supreme Court in *Mitchum v. Foster*, 407 U. S. 225 (1972). I find no more explicitness contained in the language of § 1983 to qualify it as an exception to § 2283, than is present in the clear and unambiguous language of § 216 (a).

Appendix "B".

Judgment.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 72-1232

JAMES P. MITCHELL, Secy. Labor,
United States Dept. of Labor,

vs.

WILLIAM FIORE, IND. and d/b/a FIORE TRUCKING COMPANY and WILLIAM FIORE CONTRACTING COMPANY,

Appellant.

(D. C. Civil Action No. 17712.)

No. 72-1233.

THE UNITED STATES

vs.

In Re: WILLIAM FIORE, Individually and doing business as Fiore Trucking and William Fiore Contracting Company,

Appellant.

(D. C. Criminal No. 71-208.)

On Appeals from the United States District Court for the Western District of Pennsylvania.

Present: VAN DUSEN, ALDISERT and HUNTER, *Circuit Judges.*

Judgment.

These causes came on to be heard on the records from the United States District Court for the Western District of Pennsylvania and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed February 2, 1972, be, and the same is hereby affirmed, except as herinafter modified, in accordance with the opinion of this Court. The said judgment of the said District Court is modified as follows: (a) Paragraph 2 shall read: "2. A civil judgment is entered against the said defendant, William Fiore, in the sum of $2,000.00 covering the investigative costs and preparation of the trial in this case." (b) In paragraphs 1 and 2 under "IMPRISONMENT," this language shall be substituted for "February 15, 1972:" "the fifteenth day after the mandate or certified judgment in lieu of mandate is received by the Clerk from the United States Court of Appeals for the Third Circuit." Each party shall bear his own costs in this Court.

Attest:

THOMAS P. QUINN,
Clerk.

December 12, 1972.

Appendix "C".

Sur Petition for Rehearing.

UNITED STATES COURT OF APPEALS
For the Third Circuit.

No. 72-1232.

JAMES P. MITCHELL, Secy. Labor,
United States Dept. of Labor,

v.

WILLIAM FIORE, Ind. and d/b/a FIORE TRUCKING COMPANY and WILLIAM FIORE CONTRACTING COMPANY,

Appellant.

No. 72-1233.

THE UNITED STATES

v.

In Re: WILLIAM FIORE, Individually and doing business as Fiore Trucking and William Fiore Contracting Company,

Appellant.

Present: SEITZ, Chief Judge, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN and HUNTER, *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who par-

ticipated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for reahearing is denied.

BY THE COURT:

/s/ FRANCIS L. VAN DUSEN,
Judge.

Dated: January 3, 1973.